

UNION TEXAS PETROLEUM ENERGY CORPORATION

IBLA 99-201

Decided August 25, 2000

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, affirming as modified an order of the Royalty Management Program, Minerals Management Service, requiring recomputation and payment of any additional royalty due from natural gas production from Indian tribal leases. MMS-94-0052-IND.

Affirmed in part; set aside in part and case remanded.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Payments

MMS may require restructured accounting when MMS has, by sampling a portion of but not all of the producer's production records, discovered a systemic error or deficiency (whether or not amounting to a pattern of error) in the producer's royalty computations. Finding an error or deficiency would not justify restructured accounting without a showing that it is likely that the error was repeated in other months and/or other leases. A showing of a repeated error or deficiency over an extended period of time and for a number of leases establishes a systemic error or deficiency sufficient to justify restructured accounting.

2. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally--Statute of Limitations

The 6-year statute of limitations for the commencement by the United States of civil actions for money damages, found at 28 U.S.C. § 2415(a) (1994), does not limit administrative action within the Department. MMS orders to recalculate and pay additional royalty due under an Indian lease are administrative actions not subject to the statute of limitations.

APPEARANCES: Jonathan A. Hunter, Esq., and Stevia M. Walther, Esq., New Orleans, Louisiana, for the Union Texas Petroleum Energy Corporation; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

# OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Union Texas Petroleum Energy Corporation (UTPEC) has appealed a November 10, 1998, decision issued by the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, affirming as modified a January 14, 1994, Order issued by the Area Manager, Dallas Area Audit Office, Royalty Management Program, Minerals Management Service (MMS). The MMS decision directed UTPEC to conduct a "restructured accounting," for natural gas produced and sold from eight Jicarilla Apache Tribal oil and gas leases in the San Juan Basin, during the period from January 1, 1983, through December 31, 1989, and pay any additional royalty due, based on the accounting. 1/

Natural gas produced from UTPEC wells on the Jicarilla Apache Tribal leases was a "wet gas" which was sold at the wellhead under various gas purchase agreements entered into by UTPEC. 2/ The gas was processed, on behalf of GCNM and the El Paso Natural Gas Company (EPNG), by the Sunterra Gas Processing Company (Sunterra) at Sunterra's Lybrook Gas Plant, and resold as natural gas liquid products (NGLP) and a dry residue gas. 3/ UTPEC paid the royalties on wet gas sold to GCNM, and EPNG paid the royalties on the gas sold to it. 4/ This case concerns only the wet gas sold to GCNM and processed at the Lybrook Gas Plant. (Decision at 3.)

The Department has considerable discretion under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g (1994), and its

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1/ This case involves production from the following leases: 609-000010-0, 609-000047-0, 609-000103-0, 609-000107-0, 609-000150-0, 609-000153-0, 609-000417-0, and 609-000418-0. Effective Jan. 1, 1990, UTPEC sold its interest in these leases to Meridian Oil Production, Inc. (Meridian).

2/ Prior to Jan. 28, 1985, sales to Gas Company of New Mexico (GCNM) were nonarm's-length, as GCNM and UTPEC were affiliated companies. (Decision at 2 n.3, 3 n.5.) On that date, GCNM was purchased by the Public Service Company of New Mexico, and subsequent agreements were arm's-length.

3/ From Jan. 1, 1983, until Dec. 31, 1986, the Lybrook Gas Plant was owned and operated by the Southern Union Processing Company, a subsidiary of the Southern Union Company.

4/ In the case of some leases (609-000010-0, 609-000047-0, 609-000417-0, and 609-000418-0), a percentage of the wet gas was taken by the Tribe as an in-kind payment of royalty, during all or part of the period from January 1983 through December 1989. (Decision at 3.) MMS' January 1994 Order was directed solely at errors in royalty paid for wet gas sold at the wellhead and then processed at Sunterra's Lybrook Gas Plant. Id.

implementing Departmental regulations, regarding the computation of royalty owed on natural gas produced from Indian oil and gas leases. Supron Energy Corp., 46 IBLA 181, 187 (1980). In Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536, 549-51 (D. N.M. 1979), aff'd in part, rev'd in part on other grounds, 782 F.2d 855 (10th Cir.), cert. denied, 479 U.S. 970 (1986), the court ruled that 25 C.F.R. § 211.13(a) required valuation of wet gas produced from an Indian lease on the greater of the value of the gas at the wellhead or the aggregate value of the NGLP's and dry residue gas remaining after processing, regardless of whether the wet gas had been sold before or after being processed into its constituent components.

As a part of ongoing efforts to ensure compliance with November 5, 1979, and January 23, 1986, Federal district and circuit court rulings in Jicarilla Apache Tribe v. Supron Energy Corp., supra, MMS and the Jicarilla Apache Tribe (Tribe) audited UTPEC's royalty payments for the period from January 1983 through December 1989.

In its January 1994 Order, MMS found that UTPEC had incorrectly computed the royalty pursuant to 30 C.F.R. § 206.103 (1987) (pre-March 1, 1988, production) and 30 C.F.R. § 206.152 (1990) (post-March 1, 1988, production), because it had undervalued the natural gas at the wellhead by using the contract price received under its gas purchase agreements. (Order, dated January 14, 1994, at 2-5.) The Order stated that MMS was entitled to ensure that royalty was based on the reasonable value of the natural gas produced if higher than the contract price received by UTPEC, to insure the greatest royalty for the Tribe. (Order at 4.) It stated that the contract price constituted the minimum basis, but not necessarily the "reasonable value," for royalty computation purposes: "The mere fact that a producer has agreed by contract to accept less than the current 'reasonable value of production' does not mean that the royalty owner must accept a royalty based on a price less than the reasonable value." (Order at 4 (citing 30 C.F.R. § 206.103 (1987)).)

For the production from January 1983 through February 1985, MMS held that UTPEC erred in its royalty computations by using its contract price, rather than the applicable maximum lawful price allowed under the Natural Gas Policy Act of 1978 (NGPA), as amended, 15 U.S.C. §§ 3301-3432 (1994) ("NGPA price"). (Order at 2-3.) Citing 25 C.F.R. § 211.13(a) (1990) and 30 C.F.R. § 206.103 (1987), MMS concluded that the appropriate price was the applicable NGPA price because it constituted the highest price paid, in a fair and open market, for the major portion of like-quality gas produced and sold from the field where the leased lands are situated, and thus the applicable "major portion price."

Similarly, for the production from March 1985 through February 1988, MMS held that UTPEC erred in its royalty computations by using its contract price, rather than the applicable NGPA price. It noted that UTPEC's contract price varied during this period, depending on the relevant formula

in the applicable contract. 5/ The end result was that UTPEC's contract price was lower, and sometimes considerably lower, than the contract price (NGPA price) received for production from other Tribal leases during the same period. (Order at 3-4.) "During this period when [UTPEC's] contract allowed lower prices, the Tribe continued to receive NGPA maximum prices through other contracts." Id. at 4. MMS concluded that the applicable NGPA price must be used because it was the "major portion price." 6/ Id. at 3-5.

For the production from March 1988 through December 1989, MMS found no immediate error in UTPEC's use of its contract price for royalty valuation purposes. Invoking the regulations which went into effect March 1, 1988, (specifically 30 C.F.R. § 206.152(a)(3) (1990)), MMS held that, pending a determination of whether UTPEC's contract price comported with the "major portion price," UTPEC was to have used the contract price in its royalty computations. (Order at 5.) It noted: "If and when a different value is computed, [UTPEC] will be liable for any additional royalties." Id.

The Order then addressed other UTPEC royalty valuation issues. MMS found that, when UTPEC adjusted the volumes of gas produced from the leases following its original royalty computations, it failed to perform new "dual accounting" (or "accounting by comparison"), as required by 25 C.F.R. § 211.13(a) (1990), 30 C.F.R. § 206.105(c) (1987), and section 3(c) of its leases, using the corrected volume figures. (Order at 5.) MMS noted that its findings (set out in Enclosure 2) were supported by the company's acknowledgment that it failed to perform dual accounting in all

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5/ MMS noted that, under the gas purchase agreement between UTPEC and GCNM, the contract price for all gas produced by UTPEC after Feb. 25, 1985, was pegged at \$2.80 per million Btu (MMBtu), with an increase of \$0.05 per MMBtu every 6 months beginning Aug. 25, 1985, and that this was less than the applicable NGPA prices at the time. (Order at 3.) It further noted that when GCNM exercised a "market out" provision of the agreement on Jan. 27, 1986, the contract price was set at 95 percent of the price currently in effect. Id. The record reflects considerable fluctuation in the price received by UTPEC after February 1985. See Field Report, dated Apr. 4, 1996, at 4.

6/ The January 1994 MMS Order did not specifically state that the applicable NGPA price, set in the other contracts, was the "major portion price." However, it did say that UTPEC's contract price was "not representative," and that other production constituted the "major portion of production." (Order at 3.) The unmistakable conclusion is that MMS regarded the applicable NGPA price to be the highest price paid for the major portion of like-quality gas produced and sold from the field, and thus the "major portion price." Any ambiguity was erased on appeal: "MMS concludes that contracted NGPA ceiling prices constitute the major portion price for the period March 1985 through February 1988." (Field Report at 4; see Decision at 12.)

instances. Id. It noted that it was not sufficient that UTPEC had performed dual accounting at the time of its initial royalty computations. The Order directed UTPEC to recompare the value of the wet gas at the wellhead (based on the "Btu Method") with the value of the NGLP's and dry residue gas left after processing (based on the "Net Realization Method"), and use the highest value for royalty computation. See Supron Energy Corp., 46 IBLA at 192-94.

MMS also determined that, when valuing NGLP's and dry residue gas for dual accounting purposes, UTPEC failed to employ the processing allowance MMS had adopted in a July 27, 1992, "Dear Payor" letter. (Order at 7.) These allowances reflected the "actual costs" incurred by Sunterra in processing the wet gas from the subject leases, based on a 1991 review of the allowances for processing operations at Sunterra's Lybrook Gas Plant, for calendar years 1981 through 1989. (Decision at 18 (quoting from Dear Payor Letter at 2).) MMS noted that it appeared that UTPEC was "unaware" that it was required to use these allowances. (Order at 7.)

The Order noted other deficiencies in UTPEC's royalty computations, notably the failure to use accurate volumes and Btu measurements. (Order at 6-8.) Based on the observed discrepancies between UTPEC's reports of its royalty computations and other reports and records of volumes of natural gas produced and sold from four leases during part of calendar year 1986 and all of calendar 1987, MMS concluded that errors in UTPEC's royalty computations resulting from incorrect volume figures were "recurring," and likely to have occurred in leases and months other than those audited. Id. at 7. MMS also noted discrepancies between reported and recorded Btu measurements for production, and stated that UTPEC had failed to respond to requests that it verify Btu measurements and demonstrate that the verification was based on actual tests. Id. at 8. MMS concluded that, absent "proper" supporting documentation, it was unable to assess the validity of the Btu measurements used in royalty computations. Id. at 8.

MMS also determined that, during the 7-year audit period, UTPEC had routinely made adjustments to all eight lease accounts which were not properly documented, justified, or explained. (Order at 8-9.) These adjustments consisted of credits taken without appropriate notation on the monthly report, including failing to properly note overpayment during a particular month (using transaction code 50 on Form MMS-2014, to establish a recoupable balance), for which recoupment was sought in a subsequent month (using transaction code 51 on that form). According to MMS, the adjustments (set out in Enclosure 4) resulted in a total unsupported credit of \$313,335.89. Id. at 9. MMS noted that, despite having been notified of MMS' preliminary determination of this deficiency on July 30, 1993, UTPEC failed to substantiate these adjustments. MMS noted that a "separate compliance schedule" had been established for submitting sufficient proof to substantiate its adjustments, failing which UTPEC was required to repay the total credit amount. Id. at 9.

Concluding that the record sufficiently documented "patterns of irregularities" in royalty computations, the January 1994 Order directed UTPEC to engage in "restructured accounting," reviewing its monthly royalty computations for all eight leases during the 7-year period from January 1983 through December 1989, to recompute the royalties, and to pay any additional royalties found to be due. (Order at 10.) It specifically required UTPEC to provide a "corrected" volume of natural gas produced and sold from each of the eight leases each month during the 7-year period, and an example of the "method" by which UTPEC proposed to perform dual accounting for royalty computation purposes within 90 days of receipt of the order. Id. UTPEC was given 120 days following notification of MMS' approval of the reported volumes and dual accounting method to recalculate royalties. Id. UTPEC was to use the gas prices and processing allowances approved in the body of the Order or an attachment to the Order when undertaking this recalculation. Following its recalculations, UTPEC was to immediately pay "any additional royalty calculated to be due" to the Tribe and file the appropriate reports with MMS. 7/ Id.

The January 1994 Order offered UTPEC an alternative means for compliance. This option was intended to permit UTPEC to forego the "laborious task" of recomputing royalties for all eight leases and for all 7 years by settling the entire question, and would be subject to Tribal concurrence. (Field Report at 2; see id. at 7.) It provided that UTPEC could pay the Tribe \$711,707 (the additional royalties found by MMS to be due), within 30 days of receipt of the order. (Order at 10.) 8/ Id. at 9. An added amount, which would be estimated by UTPEC and approved by MMS, representing the additional royalties for the remainder of the audit period would be paid to the Tribe. Id. at 10-11. This estimate was to be submitted within 90 days of receipt of the order, with payment 30 days after MMS approval. Id. MMS stated that, if UTPEC satisfied these alternative requirements, UTPEC would fulfill its dual accounting and "major portion analysis" obligations to the Tribe. Id. at 11.

Finally, MMS stated that appropriate late payment charges would be computed and billed upon the receipt of the additional royalties, and

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7/ If it followed the steps outlined in the Order, UTPEC was not required to justify any of its incorrect credit adjustments. (Order at 10.)

8/ MMS stated that it had not performed dual accounting, relying solely on the value of the gas at the wellhead, the highest volumes reflected on GCNM or Bureau of Land Management (BLM) reports, GCNM's Btu measurements, and the applicable NGPA price for each well (or, if unknown, section 103 NGPA pricing). (Order at 9; see also Enclosure 5.) The MMS recalculation generally covered calendar year 1987. For Leases 609-000010-0 and 609-000418-0 the period was from February 1986 through February 1988. Id. Thus, the \$711,707.67 was additional royalties MMS deemed to be due from six of the leases in calendar year 1987, and from two leases from February 1986 through February 1988.

that failure or refusal to comply with the January 1994 Order might subject UTPEC to the assessment of civil penalties, pursuant to section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (1994). (Order at 11.) UTPEC appealed MMS' January 1994 Order.

In her November 1998 decision, the Deputy Commissioner generally upheld MMS' January 1994 Order. She first ruled that the record supported MMS' determination that UTPEC had failed to properly use applicable NGPA prices in its royalty computations between January 1983 and February 1985. (Decision at 7-8.) The Deputy Commissioner noted that the gas purchase agreement was amended in 1978 to allow the contract price to adjust to the NGPA price. Id. at 7 n.7, 8. Noting that the evidence "suggests" that UTPEC had failed to pay the "excess royalties" involved in the Jicarilla litigation, she rejected UTPEC's contention that it had paid royalty based on the applicable NGPA price, and found that the royalties paid were "based on less than the applicable MLP [maximum lawful price]" under NGPA. 9/ Id. at 8.

However, the Deputy Commissioner ruled that, pending an MMS determination regarding whether the royalty basis was less than the "major portion price," UTPEC had not erred by using its contract price for royalty valuation between March 1985 and February 1988. (Decision at 12-13.) This ruling was based on the conclusion that the evidence in the record was not sufficient to demonstrate that the prices used by MMS for other Tribal production actually constituted the highest price paid for the major portion of like-quality gas produced from the field where the leased lands are situated. Id. The Deputy Commissioner concluded that MMS had not performed a major portion analysis for production from the eight leases during this time period. Similarly, she held that UTPEC properly used the contract price for royalty valuation purposes during the period from March 1988 through December 1989, pending MMS' completion of a major portion analysis.

The Deputy Commissioner agreed that, in spite of the fact that MMS had found no errors in the gas price UTPEC used for royalty valuation during that period, a "clear pattern of pricing irregularities justified a

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9/ UTPEC noted on appeal from the MMS Order that part of its original royalty payments were "excess royalties," computed on the basis of the difference between the contract price (generally the NGPA price) and the lower ceiling price under applicable State statute. These royalties were paid directly to the Tribe from January to October 1983, and to the Federal court from October 1983 through February 1985, during the pendency of Jicarilla Apache Tribe v. Supron Energy Corp., No. 75-247-M (D. N.M.). (Supplemental Statement of Reasons for Appeal from MMS (Supp. SOR) at 14 (citing Affidavit of Alan D. Guerrero, Manager, Oil and Gas Revenue Accounting, UTPEC, dated Oct. 7, 1994 (Guerrero Affidavit) (attached to Supp. SOR), at 2).) The Deputy Commissioner noted that MMS had found evidence indicating that MLP's were not consistently paid. (Decision at 8 n.9.)

demand that UTPEC demonstrate that royalties had been based on the contract price." (Field Report at 5; see Decision at 14.) She concluded that UTPEC failed to perform dual accounting "for each month and for each lease," after adjusting the volume figures for production from the leases. (Decision at 15.) She specifically relied on UTPEC's statement on appeal that its files documented dual accounting "in some instances," thus admitting that dual accounting was not performed after every adjustment. Id. at 16 (quoting from Supp. SOR at 27).

Turning to the question of the appropriate processing allowance for use in the net realization calculation, the Deputy Commissioner noted that the July 1992 Dear Payor letter provided that, while the processing allowance for net realization calculations was to be "determined by the actual costs incurred by the party processing the gas," the allowance "may be the plant owner's cost \* \* \* or an arm's-length charge to the initial purchaser if not the plant owner." (Decision at 18 (quoting from Dear Payor Letter at 2) (emphasis added).)

The Deputy Commissioner held that MMS had correctly required UTPEC to use the actual cost of processing UTPEC's wet gas during the period from January 1, 1983, through December 31, 1986, to derive a theoretical net realization value, because there was no "arm's-length charge to the initial [third-party] purchaser." (Decision at 18.) However, she held that, from January 1987 through December 1989, no affiliation existed, and UTPEC could use the plant costs Sunterra charged third parties pursuant to arm's-length agreements. Id. at 19.

The Deputy Commissioner confirmed MMS' finding that UTPEC had used inaccurate volume figures, amounting to a systemic error for the eight leases and the 7-year period at issue. (Decision at 16-17.) In making this finding she relied on "discrepancies" between the reported volumes used in UTPEC's royalty computations and the volumes otherwise reported or recorded. Id. at 17. Concluding that the evidence was sufficient to justify restructured accounting, the Deputy Commissioner upheld MMS' January 1994 Order, directing UTPEC to verify the volumes. Id.

The Deputy Commissioner also rejected UTPEC's contention that it had properly computed and paid royalty on production, even though the Btu measurements were not correctly reported. (Decision at 20-22.) She concluded that UTPEC's failure to correctly report measurements made it impossible for MMS to verify the accuracy of the payments. Id. at 21. For this reason she upheld the MMS' January 1994 Order requiring UTPEC to perform restructured accounting verifying Btu measurements. Id. at 21-22.

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<sup>10/</sup> The Deputy Commissioner noted that there were no arm's-length third-party plant cost figures in the record. (Decision at 19 n.17.) However, she indicated that UTPEC could obtain this information with the assistance of MMS' Royalty Valuation Division. Id. at 19.



The Deputy Commissioner also noted that UTPEC had accounted for only \$33,000 of the \$313,000 credit adjustment errors detected by audit, thus refuting UTPEC's assertion that only "random, isolated, de minimis errors" remained, and upheld MMS' January 1994 Order, requiring UTPEC to perform restructured accounting to assure that this error was corrected. (Decision at 20-22.)

The Deputy Commissioner also rejected UTPEC's argument that MMS generally lacked the statutory authority to require restructured accounting. She rejected UTPEC's assertion that it was being required to engage in a "self-audit" (followed by a reconciliation of lease accounts), finding that UTPEC was not being required to audit its own lease accounts, looking for any and all errors. The reason was that, having already found (through its own audit) "patterns" of error in UTPEC's royalty computations, MMS was properly directing UTPEC to review its lease accounts and determine the actual extent of error and make the corresponding corrections in compliance with its overriding obligation to properly calculate and pay royalty. (Decision at 22.) She further noted that statutory authority for the order to perform restructured accounting is found in section 107(a)(1) of FOGDMA, 30 U.S.C. § 1717(a)(1) (1994), which authorizes MMS, as the designated delegate of the Secretary of the Interior, to "require 'any person to submit in writing such affidavits and answers to questions as the Secretary may reasonably prescribe.'" (Decision at 23.)

The Deputy Commissioner found that the MMS Order directing UTPEC to perform restructured accounting was properly based on an adequate finding of a systemic error or deficiency in UTPEC's royalty computations during the period from January 1983 through December 1989: "[MMS] audit indicates that [UTPEC] failed to adhere to contract pricing provisions, failed to dually account for all of the volume adjustments made after the initial dual accounting, failed to correctly report volumes, failed to use the proper processing allowance, and failed to correctly report Btu values." (Decision at 25.) Finding that the record showed a pattern or repeated occurrences of error, she concluded that: "It is reasonable and appropriate [for MMS] to require the lessee to answer the inquiry as to where else the error has occurred, which is the purpose of a restructured accounting. If additional royalty is due, the lessee is obligated by law to pay it to correct existing underpayments." Id. at 25-26.

Finally, the Deputy Commissioner held that UTPEC's assertion that MMS' order directing it to calculate and pay additional royalties was barred by the statute of limitations at 28 U.S.C. § 2415(a) (1994) "inapplicable" in the context of an administrative proceeding. 11/ (Decision at 22.)

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11/ The statute invokes a limitations period of 6 years and 90 days in the case of a civil action brought by the United States "for or on behalf of a recognized [Indian] tribe." 28 U.S.C. § 2415(a) (1994).

UTPEC appealed the Deputy Commissioner's November 1998 decision to this Board.

In its SOR, UTPEC contends that the record does not support MMS' finding that there was a systemic error or deficiency in its royalty computations sufficient to justify an order that it perform restructured accounting and dual accounting after adjusting gas volumes, BTU's, processing allowances, and credit allowances. (SOR at 11-15.)

[1] Section 101(c)(1) of FOGRMA, 30 U.S.C. § 1711(c)(1) (1994), directs the Secretary to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted." See 30 C.F.R. §§ 217.50 and 217.51 (1990) (emphasis added). This statutory authority entitles MMS to require restructured accounting when MMS has, by sampling a portion of but not all of the producer's production accounts, discovered a systemic error or deficiency (whether or not amounting to a pattern of error) in the producer's royalty computations. Marathon Oil Co., 149 IBLA 287, 292-93 (1999); Amoco Production Co., 123 IBLA 278, 282, 285 (1992); Amoco Production Co., 123 IBLA at 294 (Hughes, A.J., concurring). This does not constitute an impermissible "self-audit," in contravention of FOGRMA. Marathon Oil Co., 149 IBLA at 292 (citing Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1386 (10th Cir. 1992)); Amoco Production Co., 123 IBLA at 291-94 (Hughes, A.J., concurring). In these circumstances MMS can impose upon the lessee the burden of reviewing the lease accounts in an effort to disclose other instances when royalty computation has been distorted by the identified error or deficiency in order to make the necessary correction and pay additional royalty found due, if any.

We do not believe it appropriate to attempt to set out a definitive rule regarding what constitutes a systemic error or deficiency, as it should be addressed on a case-by-case basis. However, we can state that if an error or deficiency is detected, a finding of error would not justify restructured accounting without a showing that it is likely that the error was repeated in other months and/or other leases. On the other hand, an error or deficiency detected over an extended period of time and for a number of leases would clearly establish a pattern sufficient to justify restructured accounting.

In its January 1994 Order, MMS segmented the 7-year period from January 1983 through December 1989 into various time periods depending on the issue being analyzed. UTPEC contends that MMS cannot order restructured accounting in one time period because a systemic error was discovered in another time period. We do not agree. Unless it can be shown that a producer used different royalty computation methodologies during these time periods which would account for the existence of the systemic error in one period but not the other, there is no basis for a conclusion that the errors found in one period will not be found in the other. It is not crucial that the impact of the error on the producer's

royalty obligation is adverse or beneficial. <sup>12/</sup> What is important is that there is sufficient evidence to demonstrate a systemic error or deficiency in the producer's royalty computations.

UTPEC contends that MMS' finding that it had failed to accurately report the volume of natural gas produced and sold is not supported by the record. (SOR at 12-13.) It notes that Enclosure 3, which MMS relied upon for this finding, actually reflected a "small volume over-reporting" (98,518 (rather than 9,853) thousand cubic feet (Mcf), when actual production had been 98,513 Mcf) in the case of production from lease 609-000150-0 in April 1987. (SOR at 12 (citing Guerrero Affidavit at 5).) UTPEC claims that MMS incorrectly relied on an adjustment in this volume by its successor-in-interest (Meridian), sometime after January 1, 1990, to conclude that there had been a "significant under-reporting," when there was actually a slight over-reporting. (SOR at 12.) UTPEC concludes that there is no evidence that Meridian's "after-the-fact adjustment \* \* \* converted [UTPEC's] original correct volume reporting into an under-reporting," or, even if that adjustment was made, the adjustment would support a finding of "systemic reporting deficiency" on the part of UTPEC sufficient to support an order to undertake restructured accounting. Id. at 12, 13.

UTPEC also notes that Enclosure 3 revealed a "net overreporting," resulting in royalty overpayment of \$62,541.46. (Supp. SOR at 28; see SOR at 12.) UTPEC thus contends that the record does not substantiate a systemic error in its royalty computations which would justify an order to perform restructured accounting.

UTPEC has tendered evidence that it actually reported 98,518 Mcf of natural gas produced from lease 609-000150-0 in April 1987. (Guerrero Affidavit at 5.) MMS provides no evidence supporting the amount set out in its Enclosure 3. In her November 1998 decision, the Deputy Commissioner stated that the under-reporting conclusion was based upon Meridian's subsequent adjustment, which created the deficiency. (Decision at 16-17.) The basis for this adjustment is not stated and MMS, which now indicates that the fact that Meridian had made the adjustment may absolve UTPEC of responsibility for the deficit, asks that the case be remanded (see below). (Answer at 8-9 (citing Order at 1 ("Meridian \* \* \* assumed responsibility for royalty payments after [January 1, 1990]")).) We need not resolve the issue, because the evidence is otherwise sufficient to support MMS' order directing UTPEC to undertake restructured accounting to assure the accuracy of the volumes used for royalty computation.

MMS argues that the record of other discrepancies in the volumes UTPEC used in its royalty computations supports its order directing UTPEC

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<sup>12/</sup> It would also be inappropriate to characterize a failure to pay royalty throughout a calendar year as a single underpayment. The obligation to pay royalty accrues on a monthly basis. 25 C.F.R. § 211.13(a) (1990).

to undertake restructured accounting, notwithstanding the issue regarding the volume used for natural gas produced from lease 609-000150-0 in April 1987. It notes that Enclosure 3 attached to its Order details discrepancies in UTPEC's volume reporting. (Answer at 9-10 (citing Order at 6).) The Order states that MMS had found "[s]ignificant differences \* \* \* for all leases and test months reviewed," when comparing the volumes stated in reports to MMS, BLM (the surface managing agency), and the State of New Mexico and the sale and delivery volumes recorded by GCNM and the Petroleum Institute in March and April 1986. In addition, these differences were also found in reports and recorded volumes for leases 609-000010-0, 609-000418-0, and 609-000150-0 during the months January through November 1987. (Order at 6.) In addition, MMS had noted that UTPEC had also failed to properly and/or accurately attribute well production from three of the leases. Id. The Deputy Commissioner specifically relied on this evidence when upholding MMS' order. (Decision at 17.) Other than the error discussed above, UTPEC has not challenged the volume reporting errors set out in Enclosure 3, other than to state that they resulted in a "net overreporting." (Supp. SOR at 28.) We find no evidence to say that these errors were not made.

The evidence establishes a recurring error in UTPEC's volume reporting of sufficient magnitude and frequency as to be deemed to be systemic. The record supports MMS' decision to require UTPEC to engage in restructured accounting as a result of faulty volume amounts used in its royalty computations. We need not speculate on whether any final adjustment will result in an increase or decrease in royalty deemed to be owed the Tribe. As the royalty is based directly upon the quantity of natural gas produced and sold from the lease during a reporting period, MMS is obligated under FOGRMA to "ensure the \* \* \* proper collection \* \* \* of oil and gas revenues owed to \* \* \* Indian lessors." 30 U.S.C. § 1701(b) (1994). The order comports with MMS' specific duty to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted." See Marathon Oil Co., 149 IBLA at 292-93 (emphasis added).

UTPEC challenges MMS' determination that it failed to use the correct Btu measurements in its royalty computations, arguing that, while it had (for accounting convenience) consistently reported the same Btu measurement, it had used the correct measurements in its computations and paid the proper royalty. 13/ (SOR at 14-15 (citing Guerrero Affidavit at 5).) In its appeal from MMS' order UTPEC stated: "[T]he Btu was reported wrong; however, the royalties were paid in the correct amount." (Supp. SOR at 30.) It thus concludes that, to the extent the

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13/ UTPEC has provided an "example" of a recalculated royalty, using the correct Btu measurement. The resulting royalty was the same as the royalty it had paid, even though the reported measurement had been incorrect. (Guerrero Affidavit at 5.) Guerrero also states that "[t]he same analysis could be done for the other test months selected by the MMS." Id.

Deputy Commissioner upheld MMS' order requiring it to recalculate and pay additional royalties, her November 1998 decision must be reversed, since "corrected Btu reporting purely for the sake of reporting is unwarranted." (SOR at 15.)

MMS responds that it is not seeking the submission of corrected Btu measurements for the sake simply of accurate reporting, but is doing so in order that it may determine whether royalty was properly computed and paid. (Answer at 12-13.) We find it proper for MMS to require submittal of the correct Btu measurements, which are needed to comply with MMS' obligation under FOGDMA to ensure collection of the appropriate royalty on natural gas produced from Indian leases. It is not sufficient that a producer attests to the fact that the correct Btu measurements were used when calculating royalties. MMS is obligated to verify that the royalty amount is correct, and when the error is systemic, as it is in the case of improperly reported BTU values, MMS may properly require restructured accounting to achieve that end. Marathon Oil Co., 149 IBLA at 292-93. As we noted in Marathon Oil Co., in concluding that MMS properly required a producer, pursuant to section 107(a)(1) of FOGDMA, to submit documentation verifying that its royalty computation complied with applicable law:

In enacting FOGDMA, Congress clearly sought to avoid a royalty accounting and collection system operating entirely on the honor principle, with no verification of production and sales data, since this sort of arrangement had led to underreporting of production and sales in the past. See H.R. Rep. No. 859, 97th Cong., 2d Sess. 15, 16 (1982), reprinted in 1982 U.S.C.C.A.N. 4269-70.

149 IBLA at 292. We are not persuaded that all of the relevant documentation is contained in "information [already] available to MMS," thus obviating UTPEC's obligation to provide it. (SOR at 15.) MMS properly ordered restructured accounting, using the corrected Btu values for the eight leases for the 7-year period from January 1983 through December 1989, and payment of additional royalties found to be due, if any.

We are not persuaded to overturn that portion of the Deputy Commissioner's November 1998 decision upholding MMS' January 1994 Order requiring UTPEC to verify the validity of its credit adjustments for the eight leases during the 7-year audit period. UTPEC has offered no additional evidence or argument to contradict her conclusion that MMS had established a systemic error. See SOR at 15. However, we note that compliance with MMS' order to perform restructured accounting will obviate the necessity for UTPEC to "justify[]" such adjustments. The Deputy Commissioner did not alter this provision of that order. (Order at 10.) Thus, no credit adjustments need be made when undertaking that accounting.

We conclude that the November 1998 Deputy Commissioner decision properly affirmed MMS' January 1994 Order as modified, thus requiring UTPEC to perform restructured accounting in the case of its royalty computations for natural gas produced and sold from the eight Jicarilla Apache Tribal leases for the period from January 1983 through December 1989. The restructured accounting must incorporate the applicable gas prices for

March 1985 through December 1989 and accurate volume and Btu measurements. In these respects, the decision will be affirmed.

UTPEC contends that the Deputy Commissioner erred because MMS' January 1994 Order was not supported by the administrative record. Specifically, it challenges MMS' demand that it demonstrate that it had valued production between January 1983 and February 1985 at not less than the maximum lawful price allowed under NGPA. <sup>14/</sup> UTPEC asserts that there was no evidence to the contrary in the record: "[Appellant] has provided evidence that it has already paid royalties on the NGPA maximum lawful price, even where the price received by [appellant] was less than that amount." (SOR at 6; see id. at 5-7.) It argues that it submitted evidence that it had paid the "excess royalties," which were the subject of the Jicarilla litigation, either to the Tribe or to the court. Id. at 6. It contends that, "[i]n most cases," the applicable NGPA price was in fact the contract price received by UTPEC. Id.

MMS has chosen not to defend the November 1998 decision, stating that the issue of whether UTPEC actually paid royalty across-the-board on the basis of the applicable NGPA price is a "factual question" which can only be resolved by reviewing the evidence. (Answer at 3.) MMS seeks to have the case remanded to allow it to review the use of actual plant cost allowance in the calendar years 1983 through 1986, and arm's-length third-party plant cost allowance in the calendar years 1987 through 1989. (Answer at 11-12.)

UTPEC has expressed no opposition to a remand of the case for further MMS review. There being no objection thereto, and because it appears to be in the public interest and not in contravention of any law, we find it appropriate to set aside the Deputy Commissioner's November 1998 decision and remand the case to MMS for reconsideration of the question of the applicable NGPA price for royalty computations during the period from January 1983 through February 1985, the actual plant cost allowance in the calendar years 1983 through 1986, and an arm's-length third-party plant cost allowance in the calendar years 1987 through 1989. UTPEC will have the right to appeal pursuant to 30 C.F.R. Part 290.

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<sup>14/</sup> UTPEC also challenges the Deputy Commissioner's interpretation of the MMS decision as holding that when it failed to consistently use the contract price for valuation purposes between March 1985 and February 1988 it was required to undertake restructured accounting for the entire 7-year audit period. (SOR at 5-10 (referring to Decision at 8 n.9 and 13).) UTPEC contends that the MMS reference to various underpayments and overpayments for 1987 production from lease 609-000010-0 in MMS' Mar. 5, 1997, Supplemental Field Report does not demonstrate any failure to use its contract price for royalty valuation purposes, let alone a systemic error sufficient to require restructured accounting for the 7-year audit period. We agree that the Deputy Commissioner cited the MMS Supplemental Field Report as indicating that UTPEC had not used its contract price for one lease during 1 calendar year. (Decision at 13 n.14.) However, she did not state that this was the basis for ordering restructured accounting. See id. at 12-14.

[2] UTPEC reiterates its contention that MMS is barred by the statute of limitations at 28 U.S.C. § 2415(a) (1994) from requiring it to calculate and pay additional royalties which had become due before October 17, 1987. (SOR at 2-4.)

It is now well established that 28 U.S.C. § 2415(a) (1994) is not applicable to an administrative proceeding to collect additional royalties which became due beyond the statutory limitations period, since that statute applies only to a civil action initiated by a "complaint," filed by the United States in Federal court, seeking to collect money damages arising from a contract express or implied in law or fact, including additional royalties owed on production under a Federal or Indian oil and gas lease. Shell Oil Co., 150 IBLA 298, 306 (1999), and cases cited therein. Further, the statute does not apply to preclude an administrative order to recalculate additional royalties which were originally due beyond the limitations period. Nor are we persuaded that Phillips Petroleum Co. v. Lujan, 4 F.3d 858 (10th Cir. 1993), or OXY USA Inc. v. Babbitt, No. 96-C-1067-K (N.D. Okla. Sept. 8, 1998), dictate a contrary conclusion in this case. Marathon Oil Co., 149 IBLA 287, 289-92 (1999) (citing Order, dated September 7, 1994, Phillips Petroleum Co. v. Johnson (5th Cir.)).

The Deputy Commissioner's November 1998 decision upholding MMS' January 1994 Order is affirmed to the extent that it may require UTPEC to calculate and pay additional royalties which were due more than 6 years and 90 days prior to the date of the order.

Without further belaboring this decision with additional references to UTPEC's contentions regarding errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part and set aside in part, and the case is remanded to MMS for further action consistent herewith.

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R.W. Mullen  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

